

WATTE GEDARA WIJEBANDA

v.

CONSERVATOR GENERAL OF FORESTS AND OTHERS

SC (FR) Application No. 118/2004

[2009] 1 SRI LR 337

Isuru Liyanage*

ABSTRACT

This review analyses the Supreme Court decision in *Watte Gedara Wijebanda v. Conservator General of Forest and others* filed against the refusal of a permit to mine a quarry of silica quartz deposit at Kiriwalhena, an environmentally sensitive area in the Grama Sevaka Division of Polaththawa. Delivering its judgement on 7th September 2005, the Supreme Court of Sri Lanka held that the authorities vested with powers to issue permits and licenses have acted arbitrarily, negligently, and in collusion granted a mining license to the 6th Respondent which infringed the Petitioner's right to equality. The Court further ordered the 6th Respondent to bear charges of restoring the damaged environment. The review employed the desk research approach in analysing the selected judicial pronouncement. The case has made a commendable contribution to the environmental scholarship in Sri Lanka through progressive recognition, interpretation, and application of specific environmental principles along with the Constitutional standards. Thus, it is reasonable to argue that the case has continued the approach adopted in the landmark *Bulankulama v. Secretary, Ministry of Industrial Development* case with the overarching objective of recognising environmental protection as a fundamental duty of everyone.

KEYWORDS - equality in granting permits, state sovereignty and duty, principles of environmental law, right to a clean environment

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1. INTRODUCTION

Environmental protection license is a mechanism recognised under the National Environmental (Amendment) Act, No. 56 of 1988 and No. 53 of 2000. The Central Environmental Authority recognises this as a regulatory and legal tool that has meant to contain the burden on the industry, in particular by guiding pollution control and ensuring that the system responds flexibly both to changing pollution abatement technology and to new knowledge.¹ Importantly, authorities and bodies that are mandated to issue such licenses and permits should act per the legal standards and not arbitrarily. Nevertheless, irregularities in the process will not only affect the environment but indeed make a legitimate expectation to any prospective applicant later. This fundamental concern was petitioned in the case *Watte Gedara Wijebanda v. Conservator General of Forest and Others* (hereinafter *Watte Gedara Wijebanda* case). This judicial pronouncement has relied on several environmental principles in making the final decision and has undoubtedly contributed to the environmental protection and jurisprudence in Sri Lanka.

2. THE LEGAL AND FACTUAL BACKGROUND

The case was filed against a refusal of a mining license, the Petitioner claims that although his request was refused the authorities have granted a mining license to the 6th Respondent to carry out similar mining activities in an environmentally sensitive area. Thus, the Petitioner claims that the Respondents have acted in a discriminatory manner depriving and denying the Petitioner's right to equal treatment enshrined in Article 12 (1) of the Constitution of Sri Lanka.

3. THE ORDER OF THE SUPREME COURT

Delivering its decision on 7th September 2005, the Supreme Court held that the application of the Petitioner for conducting mining activities has been

1 Central Environmental Authority, 'Environmental Protection Licensing' (17 May 2017) <[https://cea.lk/web/environmental-protection-licensing#:~:text=The%20Environmental%20Protection%20License%20\(EPL,No%201533%2F16%20dated%2025.01.>](https://cea.lk/web/environmental-protection-licensing#:~:text=The%20Environmental%20Protection%20License%20(EPL,No%201533%2F16%20dated%2025.01.>) accessed 16 August 2022.

rightly refused by the relevant authorities since the proposed activity has been planned to conduct in an environmentally sensitive area. However, the fact that authorities have already issued a permit to the 6th Respondent to conduct similar mining activities in the same area has become a serious concern. Thus, the Court recognised that the wrongful granting of a mining license to the 6th Respondent affects the Petitioner's right to equality. Therefore, the Court ordered the State and the 6th Respondent to pay the Petitioner a sum of Rs. 20,000.00 and Rs. 50,000.00 respectively as costs.

As there is a serious environmental concern regarding the activities of the 6th Respondent, the court ordered the 6th Respondent to take measures to restore the land to its original position. Accordingly, the 6th Respondent was ordered to pay the cost of environmental damage and initiate a program of reforestation. He further ordered that no further mining activities should be conducted on the land.

Additionally, concerning the obvious negligence, collusion, and complicity displayed by the pertinent officials, the Court ordered the Attorney General and heads of the public institutions to conduct immediate inquiries against them.

4. ANALYSIS

Watte Gedara Wijebanda case flagged the importance of environmental protection and environmental rights nine years after the *Bulankulama* judicial pronouncement in Sri Lanka. This judgement is indeed significant since it connects the fundamental rights jurisdiction with environmental protection. The judgement has produced progressive and practical interpretations of Constitutional provisions, international environmental law principles, and standards to tackle the problem holistically. The following sub-sections discuss how the judgement employed different environmental principles and instruments for the said purpose.

4.1. Directive Principles of State Policy

As there is obvious negligence and complicity displayed by the State officials in permitting the 6th Respondent to illegal mining, the Court employed Articles 27 (14) and 28 to accentuate the duties of the State and

people regarding environmental protection. Article 27 (14) states that ‘the State shall protect, preserve and improve the environment for the benefit of the community. On the other hand, Article 28 refers to the fundamental duty of every person in Sri Lanka to protect nature and conserve its riches. However, Article 29 of the Constitution clearly states that these provisions are not enforceable in a Court of law. Laying down the judgement, Honourable Thilakawardena, J. held that,

although the Directive Principles of State Policy in Article 27 (14) of the Constitution, are not specifically enforceable against the State, they provide important guidance and direction to the various organs of State in the enactment of laws and in carrying out the functions of good governance.²

The Court in holding this position, cited *Som Prakash Rekhi v. Union of India*,³ *MC Mehta v. Union of India*,⁴ *Rural Litigation and Entitlement Kendra, Dehradun v. State of Uttar Pradesh*,⁵ and *Damodar Das v. The Special Officer, Municipal Corporation of Hyderabad*⁶ and noted that the Indian Court has used the Directive Principles dealing with environmental protection to impose an obligation on the government including courts to protect the environment. This commendable interpretation contributes to reiterating the shared duty of the State and people in regard to environmental protection, conservation, and enhancement.

4.2. Public Trust Doctrine

The public trust doctrine suggests that the State should act as a guardian when dealing with public properties, natural resources, and cultural properties and thus, the State should ensure that the public benefits from the

2 *Watte Gedara Wijebanda v Conservator General of Forest and eight Others* (2007) SC Application No. 118/2004, 338.

3 *Som Prakash Rekhi v Union of India* (1981) AIR SC 212.

4 *MC Mehta v Union of India* (1988) AIR SC 1037.

5 *Rural Litigation and Entitlement Kendra, Dehradun v State of Uttar Pradesh* (1988) AIR SC 2187.

6 *Damodar Das v The Special Officer, Municipal Corporation of Hyderabad* (1987) AIR AP 171.

decision taken against those resources. Most importantly those properties and resources cannot be subject to private ownership. In *Bandara v. Premachandra*, Honourable Fernando, J. held that

[t]he State must, in the public interest, expect high standards of efficiency and service from public officers in their dealings with the administration and the public. In the exercise of constitutional and statutory powers and jurisdictions, the Judiciary must endeavour to ensure that this expectation is realised.⁷

A similar idea was emphasised by Honourable Thilakawardena, J. who noted that the State, under the public trust doctrine, should practice ‘efficient management of resources for the benefit of all the protection and regeneration of our environment and its resources’.⁸ Therefore, negligent and arbitrary decisions, orders or permits can indeed be challenged under this doctrine. Accordingly, the Court held that ‘in contemporary concerns with the State and its role in the protection of the environment have close links with this doctrine of public trust.’⁹ Hence, State officials should act with due care, diligence and respect in terms of the decisions affecting the environment and natural resources.

4.3. Peoples’ Sovereignty

As the questionable permit perilously affected the environment and the people of the country, this case has employed the notion of peoples’ sovereignty to highlight the conduct by which the government and State officials should exercise their duties and functions. By relying on the notion of peoples’ sovereignty that is enshrined in Article 3 of the Constitution, Honourable Thilakawardena, J. notes that,

sovereignty is in the People and is inalienable and being a representative democracy, the powers of the people are exercised through persons who are for the time being only, entrusted with certain functions, and such must at all times be considered by them

7 *Bandara v Premachandra* (1994) 1 Sri L.R 301, 312.

8 *Watte Gedara Wijebanda* (n 2) 338.

9 *ibid* 358.

as a sacred trust, never be exploited for short term commercial gain.¹⁰

Further, the breach of this duty would affect not only the present generation but also the future generation as well. The Court in holding this stance cited *Hungry v. Slovakia* where the separate opinion of Honourable Weeramanthry, J. stated that it is ‘imperative of balancing the needs of the present generation with those of posterity’.¹¹

4.4. Sustainable Development and Inter-generational Equity

This judicial pronouncement has used the principle of sustainable development to accentuate that natural resources must be utilised sustainably, in upholding intergenerational equity.¹² Sustainable development is a principle that cannot be understood in isolation, it is necessarily needed to be coupled with other environmental principles and practices.¹³ Philippe Sands and Jacqueline Peel have recognised four elements of sustainable development, namely (a) principle of intergenerational equity, (b) principle of sustainable use, (c) principle of equitable use, and (d) principle of integration.¹⁴ All these elements contribute to the effective implementation of the principle of sustainable development. Similarly, this judgement has noted the need to consider the means and methods to use resources sustainably. The case has also urged State officials to consider the principle of intergenerational equity when granting permits. Therefore, officials should not compromise the access of future generations to environmental resources when granting permits. Honourable Thilakawardena, J. hence suggests that ‘the principle of inter-generational equity and long-term

10 *Watte Gedara Wijebanda* (n 2) 359.

11 *Hungry v Slovakia* (1997) 1 ICJ Reports 78, 107.

12 *Watte Gedara Wijebanda* (n 2) 359.

13 GIM Liyanage, ‘Applicability of the International Environmental Law Principles to the Sri Lankan Environmental Laws: Special Reference to Principle of Polluter Pays and Inter-Generational Equity’ (2017) 14(4) South East Asia Journal of Contemporary Business, Economics and Law <<http://seajbel.com/wp-content/uploads/2018/01/LAW-50.pdf>> accessed 16 August 2022.

14 Philippe Sands and Jacqueline Peel, *Principles of International Environmental Law* (CUP 2018) 218-228.

sustainability of our delicate ecosystem and biological diversity vests mainly in the hands of such officials'.¹⁵

4.5. Right to a Clean Environment

The right to a clean environment is a right that can be recognised in two ways, first, as a separate overarching human right, and second, as a right that can be perceived under a greening of existing human rights provisions. As the Sri Lankan Constitution has not explicitly recognised the right to a clean environment, the approach of greening human rights would necessarily address the gap and it will progressively broaden the scope of this right as well.¹⁶ This pronouncement has used the greening approach and held that the right to a clean environment is inherent in a meaningful reading of Article 12 (1) of the Constitution.¹⁷

4.6. Polluter Pays Principle

Polluter pays principle suggests that the cost of environmental damage and harm needs to be borne by the polluter. At the outset, damage to the environment needs to be calculated, following which the liability and the responsibility should be decided on the findings of such calculations.¹⁸ Significantly, the Court has progressively applied this principle and held that,

the cost of environmental damage should be borne by the party that causes such harm, rather than being allowed to fall on the general community to be paid through reduced environmental quality or increased taxation to mitigate the environmentally degrading effects of a project.¹⁹

15 *Watte Gedara Wijebanda* (n 2) 362.

16 Isuru Liyanage 'Contemporary Developments of The Right to a Clean and Healthy Environment and Its Influence on Sri Lanka' in MP Singh (ed), *Global Thoughts and Opinions* (TLL 2021).

17 *Watte Gedara Wijebanda* (n 2) 356.

18 Liyanage, 'Applicability of the International Environmental Law Principles to the Sri Lankan Environmental Laws: Special Reference to Principle of Polluter Pays and Inter-Generational Equity' (n 13) 71.

19 *Watte Gedara Wijebanda* (n 2) 363.

4.7. Public Accountability

In its judgement, the Court upheld the emerging principle of public accountability coherently and stressed the value of this novel idea. The Court held that ‘the accountability principle establishes that public servants should be held directly accountable to the public for their actions and inactions’.²⁰ The Court further held that while the polluter pays principle internalises the cost of pollution to an individual polluter, the principle of public accountability extends its liability towards corrupt or incompetent officials.²¹

5. CONCLUSION

The *Watte Gedara Wijebanda* case indeed made a commendable contribution to the environmental scholarship in Sri Lanka, particularly in the area of misregulated permits and their effects on the environment. Although this pronouncement has followed the path of the *Bulankulama* case, the case has been able to produce a broader answer by integrating not only traditional principles but also novel principles like public accountability. This case depicts the role of the Sri Lankan Supreme Court in environmental matters that arise due to the inactions of authorities. In conclusion, it is reasonable to argue that the case has upheld the value of environmental protection and environmental rights in contemporary Sri Lanka.

20 *Watte Gedara Wijebanda* (n 2) 362.

21 *ibid.*